



POLICE DEPARTMENT CITY OF NEW YORK

August 16, 2016

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Angel Colon
Tax Registry No. 926694
105 Precinct
Disciplinary Case No. 2015-13047

Charges and Specifications:

1. Said Police Officer Angel Colon, while assigned to the 83rd Precinct, on or about and between January 1, 2014 and January 31, 2014, wrongfully engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department in that said Police Officer wrongfully made an inappropriate remark to and inappropriately hugged or otherwise touched Police Officer Person A.
P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT - PROHIBITED CONDUCT - GENERAL REGULATIONS
2. Said Police Officer Angel Colon, while assigned to the 83rd Precinct, on or about and between January 1, 2014 and January 31, 2014, wrongfully engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department in that said Police Officer wrongfully made an inappropriate remark to Police Officer Person A.
P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT - PROHIBITED CONDUCT - GENERAL REGULATIONS
3. Said Police Officer Angel Colon, while assigned to the 83rd Precinct, on or about January 14, 2014, wrongfully engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department in that said Police Officer wrongfully made an inappropriate remark to Police Officer Person A.
P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT - PROHIBITED CONDUCT - GENERAL REGULATIONS
4. Said Police Officer Angel Colon, while assigned to the 83rd Precinct, on or about and between January 1, 2014 and January 31, 2014, wrongfully engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department in that said Police Officer wrongfully created a hostile work environment for Police Officer Person A.
P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT - PROHIBITED CONDUCT - GENERAL REGULATIONS
P.G. 205-36 - EMPLOYMENT DISCRIMINATION PERSONNEL MATTERS

Appearances:

For the Department: Samuel Yee, Esq.
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For Respondent: Michael V. Cibella, Esq.
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Hearing Dates:

April 13, 14, 29, May 5 and July 14, 2016

Decision:

Count 1: Not Guilty
Counts 2, 3, and 4: Guilty

Trial Commissioner:

ADCT Jeff S. Adler

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on April 13, 14, 29, May 5, and July 14, 2016. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The Department called Police Officer Person A, Police Officer Oscar Lopez, Police Officer Albert Aronov, and Sergeant Przemyslaw Szumilo as witnesses. Respondent called Sergeant Agueda Rodriguez and Lieutenant Jose Mercado as witnesses, and Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent guilty of Specifications 2, 3, and 4, but not guilty of Specification 1.

FINDINGS AND ANALYSIS

This case involves allegations that on several occasions during the month of January, 2014, Respondent made inappropriate remarks and inappropriately touched Officer Person A. At the time, both officers were assigned to the 83 Precinct. It also is alleged that this conduct constituted sexual harassment, creating a hostile work environment for Officer Person A.

On November 26, 2014, Officer Person A filed a federal lawsuit against the City and the NYPD. Joining Officer Person A as a plaintiff in that lawsuit are Officers Albert Aronov and Przemyslaw Szumilo, both of whom were colleagues of Officer Person A on the conditions team. In addition to naming Respondent, this lawsuit primarily involves multiple accusations of sexual harassment against another MOS, Sergeant David John. The sergeant, who no longer is with the Department, was Officer Person A's supervisor prior to January, 2014, and his alleged misconduct is not the subject matter of this case. Lieutenant Jose Mercado, who was a sergeant at the time, also was named in the lawsuit, but the charges against him stemming from Officer Person A's accusations were later dropped.

On direct examination, Officer Person A testified to three specific incidents with Respondent, which correspond to the first three specifications. Regarding Specification 1, which occurred on an unspecified date in January, 2014, Officer Person A stated that as she was waiting to sign out at the end of her tour, Respondent came up to her from behind. Respondent squeezed her body and pulled her to him, and whispered to her, "I want to fuck you." Officer Person A jumped up and turned around in shock, and then shook her head at Respondent. According to Officer Person A, Sergeant Mercado,

Officer Aronov, and a few others were present at the time. The sergeant laughed and said, "Colon, you're such a pervert." (Tr. 27-29, 82-83)

With respect to Specification 2, which also occurred on an unspecified date that month, Officer Person A testified that as she was waiting to sign out that day, Respondent said that he wanted to rape her. When she turned in surprise and asked him what he had just said, Respondent added, "but in a good way." Officer Person A testified that she then struck Respondent with her asp and went downstairs. Sergeant Mercado, Officer Szumilo, and a few others were present. The sergeant stated that Respondent was just a dirty old man and a pervert. Officer Person A insisted that she wasn't even talking with Respondent at the time of the incident, and she did not treat this remark as a joke. (Tr. 30-31, 129, 138)

As to Specification 3, which occurred on January 14, 2014, Officer Person A testified that she was seated behind the front passenger seat of a police car driven by Officer Szumilo, with Officer Aronov in the front passenger seat. Somewhere in the confines of the 83 Precinct, Respondent, driving a vehicle with Sergeant Mercado as the occupant, pulled up alongside on the right, so that the sergeant could sign the officers' memo books. With the windows of both vehicles lowered, Respondent looked into Officer Person A's car and told Officer Aronov, the front passenger, to tell Person A he wanted to lick her anus, and lick her toes until they creamed. Officer Aronov, with a surprised look on his face, repeated to Officer Person A what Respondent had said. Sergeant Mercado laughed, and again said that Respondent was just being a pervert. (Tr. 31- 36) Respondent asked Officer Szumilo to drive off, and he did so. (Tr. 37)

Officer Person A explained that she did not report these three incidents to the EEO office because she had no faith in that office, based on a previous bad experience in a Department interview. Also, Officer Person A did not want to risk retaliation or any kind of backlash from the precinct. Instead, Officer Aronov initiated the complaint, and investigators from the EEO office then contacted Officer Person A to discuss the incidents. (Tr. 40-41)

On cross examination, Officer Person A testified to her specific conversations with the EEO investigator, Sergeant Chou. On January 24, 2014, she and Sergeant Chou spoke on the phone. The sergeant asked if there was anything the officer wanted to report; Officer Person A told her about the "I want to rape you but in a good way" comment, but did not provide the names of any other officers who were present other than Officer Szumilo. (Tr. 54-57) Officer Person A also informed the sergeant of the squeezing-from-behind incident, stating that Respondent squeezed her from behind and said that he loved her. Officer Person A was only able to specify Officer Aronov among those who were present at that time. (Tr. 59-60) Officer Person A acknowledged that she did not mention the car incident of January 14 during that conversation with Sergeant Chou. (Tr. 61-62) She did, however, discuss an additional incident that occurred in which Respondent was speaking to her backside (Tr. 58). That alleged incident was not the subject of its own specification.

Officer Person A testified that she met with Sergeant Chou a few days later on January 27. They mostly discussed the allegations against Sergeant John, and were somewhat pressed for time. But Officer Person A did mention the uncharged incident where Respondent made comments to and about her buttocks. She also discussed the

incident where Respondent had said he wanted to rape her ... in a good way. (Tr. 86) Additionally, Officer Person A spoke with the sergeant about the incident where Respondent squeezed her and whispered, "I want to fuck you," stating that it was after this incident that she hit him with her asp. (Tr. 77-81, 89) In a form she filled out that same day, Officer Person A did not mention the January 14 car incident. (Tr. 93)

On February 3, 2014, Officer Person A again met with Sergeant Chou. At this meeting, she discussed the "I want to rape you ... but in a good way" incident, but couldn't provide the names of anyone else present other than either Officer Aronov or Officer Szumilo. (Tr. 94-95) Officer Person A testified that during that meeting, she prepared a diagram showing who was positioned where during that incident, but that diagram could not be found for this trial. (Tr. 97) At the February 3 meeting, Officer Person A again made no mention of the January 14 car incident. (Tr. 100-101)

Officer Person A also testified that after work on January 14, 2014, the same day as the alleged car incident, she signed a sworn statement that was filed as part of a federal EEOC complaint against Sergeant John and Respondent. In that statement, the officer mentioned the "I want to rape you ... but in a good way" incident, as well as a squeezing of the buttocks incident, but did not mention the car incident that supposedly occurred earlier that same day. (Tr. 73-75) In a supplemental affidavit she signed on February 25, 2014, where charges were added against Sergeant Mercado, she again did not mention the car incident. (Tr. 108-110) Meanwhile, at around that same time in 2014, IAB took over the investigation from the EEO Office. About a year later, Officer Person A sent IAB an e-mail dated February 22, 2015 where she provided specific dates for some of the incidents. That e-mail is the first time Officer Person A mentioned the car incident to the

Department, and the first time she discussed it in an interview was when she met with IAB on June 25, 2015. (Tr. 98, 134-136)

Officer Person A acknowledged that prior to November, 2013, she had no problems with Respondent, and that the two of them got along and joked around. She confirmed that there were a couple of times where she called Respondent "Colon" (pronounced like the body part), but explained that was only after Respondent first called her "Person A-anus". (Tr. 49-51) Officer Person A testified that there was joking around and touching "in inappropriate areas" among officers at the command which at times was tolerated, though not necessarily acceptable. (Tr. 117-118) But when she first learned that Sergeant Mercado might bring Respondent onto the conditions team, she protested to the sergeant that she was opposed to having Respondent join the team. (Tr. 115)

Officer Oscar Lopez testified regarding Specification 2. According to Lopez, who knew Officer Person A and Respondent only from working the same tour as they did, he overheard Respondent say to Officer Person A, "I want to rape you, in a nice way." At the time of the statement, there were a lot of people in the area, which was by the LAPS table, across from the supervisor's station at the front desk; Officer Lopez indicated the approximate area of this incident by marking an arrow on a photograph in evidence (Resp. Ex. D).

Officer Lopez recalled that he saw Officer Person A and Respondent joking around with each other, going back and forth, laughing and chitchatting, both before and after the comment was made. (Tr. 159-162, 172, 189) According to Officer Lopez, off-color, sexually explicit comments such as this were sometimes made at the precinct without anyone being upset. (Tr. 182-184) Officer Lopez did not see her strike

Respondent with her asp or react as if she were offended. Officer Lopez also testified that he could not recall anything else that was said, and only recalled this particular statement when specifically asked about it by an IAB investigator. (Tr. 173-177, 188) Officer Lopez described Respondent as generally respectful in his dealings with other members of the Department. (Tr. 180)

Officer Albert Aronov testified regarding Specifications 1 and 3. With respect to the first incident, Officer Aronov stated that as he was signing out, he observed Respondent grab Officer Person A from behind and pull her into his belly. Respondent hugged her tightly for a couple of seconds, and whispered something in her ear. Officer Aronov could not hear what exactly was whispered; during their next day tour that week, Officer Person A told him that Respondent had said that he wanted to rape her, but in a good way. He then saw Officer Person A, who looked upset, turn and tell Respondent to "get away from me." (Tr. 220-222, 266-268) Before signing out and leaving the precinct, Officer Aronov did not see Officer Person A strike Respondent with her asp. (Tr. 269) Officer Aronov marked the approximate location of this incident on a photograph in evidence (Resp. Ex. F).

Regarding Specification 3, Officer Aronov testified that he was driving a police car with Officer Szumilo in the front passenger seat and Officer Person A in the right rear passenger seat. Respondent, who was driving Sergeant Mercado in a separate car, pulled alongside to the right. According to Officer Aronov, Respondent asked him if Officer Person A was in the back of the car. When Officer Aronov confirmed that she was, Respondent compared her to a "perp", and asked if she could hear him. Respondent then told Officer Aronov to tell her that he was going to lick her toe until cheese comes out,

and that he was going to lick her anal hole. (Tr. 223-227, 273) Officer Aronov did repeat these remarks to Officer Person A, conduct for which he later received a command discipline and forfeited hours. (Tr. 227-228) Officer Aronov displayed some uncertainty as to when this incident occurred, originally suggesting it was sometime in November 2013, before later using his activity log to state that it occurred on January 14, 2014. (Tr. 270, 289)

Officer Aronov testified that he was the one who made the initial report to EEO, though he did so anonymously for fear of retaliation. (Tr. 229-230) By the time he made the report on January 22, 2014, Officer Aronov and Officer Person A already were in consultation with a lawyer regarding bringing a lawsuit against the City. (Tr. 247, 279) He acknowledged that when later interviewed by IAB, he initially lied to them by denying he was the one who made the EEO complaint. (Tr. 253-254)

Sergeant Szumilo, who was an officer in the 83rd Precinct's conditions unit at the time of the alleged incidents, testified regarding Specifications 2 and 3. With regard to Specification 2, the sergeant stated that he was near the TS desk preparing to sign out when he heard Respondent say to Officer Person A that he wanted to rape her ... but in a good way. Sergeant Szumilo testified that Officer Person A turned red in disbelief, lightly struck Respondent with her asp, and pushed him away. Respondent laughed, as did Sergeant Mercado who called Respondent an "old pervert." (Tr. 303-305) According to Sergeant Szumilo, Respondent and Officer Person A were not joking around back and forth at the time. (Tr. 344) Sergeant Szumilo marked the approximate location of this incident on a photograph in evidence (Resp. Ex. E).

Regarding the January 14, 2014 car incident, Sergeant Szumilo testified that Respondent asked whether there was a perp in the back seat. When Szumilo, who was in the front passenger seat, responded that it was Officer Person A Respondent remarked, "Person A, perp, same shit." Respondent then addressed Officer Person A directly, saying that he wanted to lick her anus, and lick the cheese from between her toes. Officer Person A appeared to get angry, and wanted them to get their memo books back and drive away. (Tr. 306-308, 335-337) Sergeant Szumilo acknowledged that he did not report this incident to EEO, since he thought that it was the responsibility of the sergeant on the scene to report it. (Tr. 309) The sergeant also admitted to posting complaints about a lieutenant and other supervisors on Facebook in 2015, for which he received a command discipline. (Tr. 313-314, 328, 332)

Sergeant Agueda Rodriguez, who was assigned to IAB at the time of the alleged incidents, testified that she was assigned the investigation of this matter on February 20, 2014. Although Sergeant John was the initial focus of the case, there also were allegations against Respondent, and Sergeant Rodriguez investigated those as well. After reviewing the work done by Sergeant Chou from the EEO Office, Sergeant Rodriguez conducted her own follow-up interviews with about 30 MOS who she believed might have relevant information. (Tr. 392-396) In general, most of these witnesses appear because they are compelled to do so, not voluntarily. (Tr. 405) Approximately 264 DD-5 reports were generated as part of this investigation, though some of the reports chronicled interviews with officers who, it turned out, had nothing to offer about this matter. (Tr. 402, 408-409)

Lieutenant Jose Mercado testified that he did not know Respondent prior to coming to the 83 Precinct as a sergeant in November 2013. Lieutenant Mercado replaced Sergeant John as conditions team sergeant beginning around the second week of January, 2014. The sergeant learned that he and Respondent shared military backgrounds, and the sergeant sought background information from Respondent regarding how things worked at the command. (Tr. 435-436, 447, 480) As conditions sergeant, he used Respondent as his operator on one or two occasions. (Tr. 450, 485) Sometime in January, the sergeant announced to his team that he intended to bring Respondent into the unit to fill one of two vacancies. The sergeant's impression was that Respondent was humble, professional, and that workers at the precinct liked him, though the sergeant didn't check to see if Respondent had any disciplinary history. (Tr. 444, 449, 481) At another team meeting a couple of days later, Officer Person A suggested that she didn't like Respondent, stating that he was "a perv"; at no time did Officer Person A or any other member of the team elaborate on this comment, and the sergeant did not pursue it. (Tr. 446, 489, 506)

According to Lieutenant Mercado, he did not recall any of the alleged incidents occurring. He never witnessed Respondent speak in a crude or derogatory way to Officer Person A, or any other female officers. Lieutenant Mercado insisted that he would not have tolerated any such behavior had it occurred. (Tr. 449, 456-458, 471) Lieutenant Mercado explained that when charges and specifications were brought against him for his failure to notify EEO and failure to supervise, he entered a "nolo contendere" plea and forfeited 20 vacation days; his understanding was that he made no admission of wrongdoing, and only took the plea to expedite his promotion to lieutenant. (Tr. 461-462,

499, 502) He also testified that he was a much more hands-on supervisor than his predecessor, and that Officers Aronov and Szumilo often covered for Officer Person A, who was not as proficient as they were in taking care of paperwork in a timely manner. (Tr. 470)

Respondent testified that he never engaged in any of the behavior alleged in the specifications, and was "shocked " when he learned of the accusations. After his meeting at the EEO office, Respondent called Sergeant Mercado and told him he that he no longer wanted to join the team; Respondent instead was assigned to the business conditions team. (Tr. 518-520, 524, 526) Respondent acknowledged that he and Officer Person A did jokingly refer to each other as "Colon" (pronounced as the body part) and "Person A-anus", which was a daily routine for them. He insisted that she never indicated that such joking was unwelcome. (Tr. 521) Respondent also testified that he regularly greeted Officer Person A, and other female officers, by shaking hands and exchanging a kiss on the cheek; Officer Person A never complained about this either. (Tr. 523)

With respect to each of the incidents alleged in the first three specifications, the Department relies primarily on Officer Person A, Officer Aronov, and Sergeant Szumilo. There were inconsistencies in Officer Person A's accounts of what occurred, and delays in her reporting certain incidents. She did, however, describe her encounters with Respondent in detail, and the fact that she voiced her opposition to having Respondent join the conditions team, describing him as a "perv", adds some measure of credibility to her testimony. Similarly, there were inconsistencies in the accounts of Officer Aronov and Sergeant Szumilo, though they, too, were detailed in their descriptions of what

occurred. The three are joint plaintiffs in the pending federal lawsuit which seeks monetary damages.

Meanwhile, Sergeant Mercado, who testified for Respondent, was not a neutral witness, as he was disciplined (through a "nolo contendere" plea) for not taking any supervisory action despite being present for each of the three incidents. There also are credibility questions surrounding Respondent's testimony, since he has a clear interest in the outcome of this case. The one truly independent eyewitness to appear at trial was Officer Lopez, who testified only about the incident covered by Specification 2. Officer Lopez provided significant corroboration for that count, and his testimony also was relevant regarding Specification 4.

The first three specifications only charge Respondent with "engaging in conduct prejudicial to the good order, efficiency, or discipline of the Department." Specification 4, however, takes it a step further, alleging that Respondent created a hostile work environment through his sexual harassment of Officer Person A. The standard for assessing sexual harassment charges is set forth in the U.S. Supreme Court case of *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399 (1986), which held that in cases where sexual harassment is alleged, the court must look to the totality of circumstances in order to determine whether the alleged sexual advances were "unwelcome." This approach was followed locally in *In the Matter of Bartle v. Mercado*, 235 AD2d 651 (3rd Dept. 1997), where a Human Rights commissioner's determination of sexual harassment was set aside based on an employee's failure to communicate the "unwelcomeness" of the contacts. Additionally, in order to establish that such conduct created a hostile work environment, the remarks must amount to more than "petty slights

and inconveniences.” See *Williams v. NYC Housing Authority*, 61 AD3d 62 (1st Dept. 2009).

These standards are encapsulated in Patrol Guide section 205-36, which defines sexual harassment as “Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature” that has the effect of “unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive work environment.” Not only does this section provide a framework for evaluating a sexual harassment claim, it also places members of the service on notice as to the type of conduct that will not be tolerated by the Department, including the making of “sexually suggestive remarks.” Similarly, the EEO policy guidelines specifically cite to this Patrol Guide section, and reiterate that “each individual has the right to work in an environment free from sexual harassment.” It is in this context that this tribunal assesses the allegations in this case.

Specification 1 alleges that Respondent came from behind Officer Person A and whispered to her, “I want to fuck you.” It also is alleged that Respondent pressed the front of his body against Officer Person A’s back as he made this remark. The first part of the analysis is to determine whether the credible proof has established that this incident did occur. I find that it has not.

There are inconsistencies in the witnesses’ accounts of this alleged incident. When she described this incident at trial, Officer Person A did not testify that she used her asp on Respondent on this occasion, instead claiming that the asp was part of the Specification 2 incident. However, in her EEO interview of January 27, 2014, she claimed that she struck Respondent with her asp as part of this incident. Limited

corroboration for this specification came from Officer Aronov, though he testified that Officer Person A later told him that what Respondent whispered was "I want to rape you...in a good way"; this is the comment that, according to other testimony, Respondent allegedly made as part of the Specification 2 incident. Lt. Mercado testified that he never witnessed an incident such as this, and Respondent denied it as well.

On the one hand, despite his strong background with the Department and with the military, Lieutenant Mercado's credibility is questionable, given that he remains a part of the civil lawsuit, and that he accepted a penalty (without pleading guilty) for his failure to notify EEO and failure to supervise. Similarly, the denials of Respondent are self-serving. Nevertheless, the contradictions in the accounts of the Department's witnesses, where details of this alleged incident are conflated into an entirely separate occurrence, raise serious questions as to whether this incident ever occurred. Further, neither Department witness was able to provide a precise date for this event at trial. Adding to this uncertainty is the lack of credible corroboration from a disinterested witness. Taken as a whole, the credible evidence is insufficient to persuade this tribunal that the incident occurred as alleged. Accordingly, I find Respondent not guilty of Specification 1.

Specification 2 alleges that Respondent said to Officer Person A, "I want to rape you...but in a good way." Again, the first issue is whether the credible proof has established that this comment was made. I find that it has.

Officer Person A was consistent and detailed in describing this incident. Sergeant Szumilo provided some corroboration, claiming he heard the remark in the area by the TS desk. Officer Lopez, a disinterested party, provided more meaningful corroboration, testifying that he heard Respondent make that statement to Officer

Person A near the LAPS desk. Although Officer Lopez was asked about the statement in a somewhat leading manner by the IAB investigator, and he was unable to recall anything else said during the interaction, the "I want to rape you" statement is the type that would reasonably stand out in one's mind, and this tribunal credits Officer Lopez's testimony that he heard it.

Counsel for Respondent argues that even if this statement was, in fact, made, Respondent still should be found not guilty because the comment was made in a context that did not constitute harassment. Counsel relies on the U.S. Supreme Court case of *Meritor Savings Bank v. Vinson*, discussed above, in suggesting that the Department must prove not just that the statement was made, but that it was unwelcome by Officer Person A. This tribunal disagrees. Unlike Specification 4, which alleges sexual harassment and will be discussed more fully below, this specification only charges Respondent with "engaging in conduct prejudicial to the good order, efficiency, or discipline of the Department." The issue, then, is whether the "rape" comment made by Respondent can reasonably be considered acceptable work-place conduct for an on-duty officer in a crowded precinct. This tribunal finds that it cannot. Regardless of how the comment might have been perceived by Officer Person A, this remark, uttered in the presence of other officers, was unprofessional on its face. The Patrol Guide and the EEO policy guidelines place members on notice that sexually suggestive remarks such as this are unacceptable. It was inappropriate for Respondent to tell a fellow officer, even in a joking manner, that he wanted to rape her, and I find him guilty of Specification 2.

Specification 3 alleges that while sitting in an adjoining police car, Respondent said to Officer Person A words to the effect that he wanted to lick her anus and lick her

toes until they creamed or the cheese came out. Again, the initial determination to be made is whether the credible proof has established that this comment was, in fact, made by Respondent. I find that it has.

Counsel for Respondent brought out that there were multiple interviews where Officer Person A failed to mention this alleged incident, as well as complaint reports where she failed to list it. One such report was filed the exact same day as the alleged incident. Sergeant Mercado denied this incident ever occurred, as did Respondent, though again, that denial is self-serving. Officer Aronov and Sergeant Szumilo, meanwhile, offered significant corroboration for this incident. Although some of their details were inconsistent with Officer Person A's account, such as who was positioned where in the vehicle, mistakes involving those types of details might be attributed to the vagaries of memory over time. What likely stood out were the words that were said, namely that Respondent wanted to lick Officer Person A's anus, and lick her toes. All three witnesses maintained they heard Respondent make these remarks. Further, Officer Aronov accepted a command discipline for allegedly repeating the crude comments to Officer Person A, which offers an additional indicia of reliability to his account. The record has established, by a preponderance of the credible evidence, that Respondent made these comments to Officer Person A as alleged.

As with Specification 2, there is no requirement to establish that this comment constituted sexual harassment. The issue is whether the remark was contrary to the good order of the Department. I find that it was. In front of other officers, Respondent told Officer Person A that he wanted to lick her anus and lick her toes. Again, members of the service are on notice that this type of sexually suggestive statement will not be

tolerated. Respondent's remark, uttered in the presence of other officers, was unprofessional and inappropriate on its face. Accordingly, I find Respondent guilty of Specification 3.

As for Specification 4, it is here where the effect on Officer Person A of any remarks made by Respondent takes on its greatest relevance. The credible evidence has established that two of the alleged statements were made by Respondent: the "I want to rape you ... but in a good way" statement, and the incident in the car where Respondent stated that he wanted to lick Officer Person A.

As noted above, the test for determining whether Respondent's comments did, indeed, amount to sexual harassment is whether Officer Person A, by her words or behavior, indicated that the remarks were "unwelcome". More specifically, did Officer Person A regard Respondent's conduct as undesirable or offensive at the time the comments were made? See *Meritor Savings Bank v. Vinson*, and *In the Matter of Bartle v. Mercado*, supra, and Patrol Guide section 205-36. Additionally, in order to establish a "hostile work environment", there must be sufficient evidence that these remarks amounted to more than "petty slights and inconveniences." See *Williams v. NYC Housing Authority*, supra.

Officer Person A insisted at trial that she did find Respondent's comments to be upsetting at the time they were made and that they were not welcome. Counsel for Respondent argues that isn't true: his position is that none of the comments attributed to Respondent were actually said, but even if they were, they were said as part of the kidding around that regularly occurred between the two of them, just as they joked around with each other's name. Counsel points to the testimony of Officer Lopez, who

described how Respondent and Officer Person A were joking around before and after the "I want to rape you ... but in a good way" comment.

However, even if Officer Person A did not openly react to those comments at the precinct, where many other members of the service were gathered, that does not mean that she welcomed the remarks. This tribunal is mindful that people react differently when confronted with behavior such as this, and that a person in her situation might well have been offended by such sexually charged remarks and not visibly betrayed that reaction, particularly regarding a comment involving rape. As Officer Person A succinctly stated, the crude behavior at the precinct may have been tolerated, though it was not necessarily acceptable.

Moreover, Officer Person A did, in fact, make her displeasure with Respondent's conduct known on two separate occasions. First, she responded to the incident where Respondent said that he wanted to "lick her anus" by urging the driver of her car to drive off. Sergeant Szumilo testified that she appeared angry about Respondent's comments, and confirmed that she wanted them to drive away. That is not the reaction of someone who is welcoming Respondent's statements. Also, there was no suggestion that there was any joking around leading up to these comments; rather, it was an unprovoked, crude remark by Respondent toward an unsuspecting Officer Person A, who was sitting in the rear of her car waiting to have her memo book scratched by a supervisor. Second, at a meeting where the plan to add Respondent to the team was discussed, Officer Person A openly voiced her opposition, in the presence of other officers. As attested to by Respondent's own witness, Lieutenant Mercado, Officer Person A made clear that she did not want Respondent to join their team, explaining that he was a "perv." With this

reaction, Officer Person A again demonstrated that the sexual remarks said to her by Respondent were not welcome.

Further, these comments by Respondent were more than "petty slights and inconveniences." They were serious and offensive enough for Officer Person A to speak out against Respondent at a team meeting, in an attempt to block him from joining the unit. Respondent's actions, telling a fellow officer that he "wanted to rape her" and that he wanted to "lick her anus and toes" amounted to completely unacceptable workplace conduct. The record has established, by a preponderance of the credible evidence, that Respondent's remarks to Officer Person A constituted sexual harassment, which created a hostile work environment for Officer Person A. Accordingly, I find Respondent guilty of Specification 4.

PENALTY RECOMMENDATIONS

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). Respondent was appointed to the Department on September 29, 2000. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum. In 2012, Respondent forfeited 30 vacation days and was placed on one (1) year dismissal probation for his guilty pleas on three separate cases: in the first case, on one day in 2009 he was off-post conducting personal business while on duty, failed to transmit an assignment disposition, and failed to respond to a supervisor's location request; in the second case, he failed to maintain his activity log throughout 2009, failed to submit accurate monthly performance reports, and on one day in 2010 failed to appear as scheduled in traffic court; and in the third case, on

one day in 2009 he improperly entered a location and issued a summons without legal authority.

Respondent has been found guilty of three of the four specifications, for telling a fellow officer that he "wanted to rape her...but in a good way," while on duty inside a crowded precinct, and on another occasion saying that he wanted to "lick her anus." Additionally, this tribunal has found that these comments constituted sexual harassment, creating a hostile work environment for Officer Person A. It is the hope of this tribunal that Respondent, who has been transferred from the precinct, now recognizes the inappropriate nature of his conduct.

In *Disciplinary Case No.* [REDACTED], a 24-year sergeant with no disciplinary history forfeited sixty (60) suspension days, was placed on one-year dismissal probation, and ordered to receive training on the Department's EEO policy regarding sexual harassment in the workplace, for engaging in sexually harassing behavior against a female police officer assigned to his squad over a 2 ½-year period, thereby creating a hostile work environment for her. Specifically, Respondent made numerous inappropriate comments, such as "How about a quickie?" and "Why don't you meet me in my car for a little blow job." Also, Respondent repeatedly requested sexual favors from the officer and engaged in unwanted and sexually suggestive touching, slapping, and grabbing. Unlike that sergeant, Respondent here does have a prior disciplinary history, though the sergeant's inappropriate conduct in that case, toward a female subordinate, was more pervasive than what Respondent has been found guilty of here.

Taking into account the totality of issues and circumstances in this matter, including Respondent's conduct in this case, his prior disciplinary history, his previous Department recognitions, and the legal precedent, I recommend that Respondent be DISMISSED from the New York City Police Department, but that his dismissal be held in abeyance for one (1) year, pursuant to Section 14-115(d) of the Administrative Code, during which time he remains on the force at the Police Commissioner's discretion and may be terminated at any time without further proceedings, and further, that Respondent forfeit forty-five (45) vacation days, as an appropriate penalty.

Respectfully submitted,



Jeff S. Adler
Assistant Deputy Commissioner Trials

APPROVED

DEC 08 2016


JAMES P. O'NEILL
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER ANGEL COLON
TAX REGISTRY NO. 926694
DISCIPLINARY CASE NO. 2015-13047

Respondent was appointed to the Department on September 29, 2000. His last three annual evaluations were 4.5 overall ratings of "Extremely Competent/Highly Competent" in 2013 and 2014, and a 3.5 rating of "Highly Competent/Competent" in 2012. He has five medals for Excellent Police Duty and two medals for Meritorious Police Duty. [REDACTED]

In 2012, Respondent pled guilty to charges and specifications in three separate disciplinary cases for misconduct that occurred in 2009 and 2010. In the first case, Respondent pled guilty to (i) failing to perform all duties and remain on post until relieved; (ii) conducting personal business while on duty; (iii) failing to immediately transmit a disposition to the radio dispatcher after completing an assignment and before leaving the scene, and (iv) failing to respond to a supervisor's location request over the radio while he was conducting personal business. In the second matter, Respondent pled guilty to (i) failing to maintain his Activity Log, as required, over a one-year period; (ii) failing to submit accurate monthly performance reports, as required, over a one-year period, and (iii) failing to report to traffic court after receiving a notification to do so. In the third case, Respondent pled guilty to (i) entering a location without sufficient legal authority, and (ii) issuing a disorderly conduct summons without sufficient legal authority. For all specifications, Respondent negotiated a penalty of thirty (30) vacation days and one-year dismissal probation.

Following his service with charges and specifications in the instant matter, Respondent was placed on Level 1 Disciplinary Monitoring, which remains ongoing.

For your consideration.

Jeff S. Adler
Assistant Deputy Commissioner Trials